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UNITED STATES FEDERAL COMMUNICATIONS COMMISSION

Telephone Consumer Protection Act - Docket # 02-278

Rules and Regulations Implementing the
Telephone Consumer Protection Act of 1991

Comments of:

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I am submitting these comments on the revised Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991. I am a JD/MBA candidate at Villanova University School of Law and am extremely interested in the recent developments concerning the do-not-call registry and its implementation. However, several aspects of the current rules pose practical and personal concerns. I thank you for allowing me the opportunity to comment on the Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991.

I. Introduction and Observations.

The issues addressed in this comment stem from the Telephone Consumer Protection Act of 1991 ("TCPA") and the FCC Rules and Regulations Implementing the Act that went into effect on December 20, 1992.

The new October 1, 2003 Rules provided consumers with several options for avoiding unwanted telephone solicitations, including a national do-not-call registry ("the Registry"). I applaud the Commission's concerns not

only about the ever-increasing number of calls, but also regarding several other factors such as the inadequacies of the company-specific do-not-call list approach, the burdens of such calls on the elderly and people with disabilities, and the onerous costs of acquiring technologies to reduce the number of unwanted calls. However, recent federal district court challenges to the Registry suggest that the Commission should consider some additional revisions to the Rules and Regulations implementing the TCPA. Among these areas that the Commission should re-examine is 47 CFR 64.1200(f)(3), regarding the exemptions to tax-exempt nonprofit organizations.¹

Telemarketing practices are vital to charitable organizations that are presently exempt under the list and therefore, the exemptions should remain intact. However, the current regulation structure provides loopholes for some organizations and those professional telemarketing companies performing fundraising on their behalf to exploit these exemptions. Therefore, the Commission should implement more stringent requirements regarding such issues as an organization's programs, governance, fund raising practices, and finances in order for a tax-exempt nonprofit organization to be declared exempt under the Registry.

II. Exemptions to the Registry.

The Registry was never intended to block all telemarketing calls. The Commission's purpose was not to eliminate telemarketing but rather to "balance the privacy concerns of consumers with the interests of legitimate telemarketing practices."² Therefore, the Commission provided for certain exemptions to the Registry. Calls or messages made by or on behalf of a tax-exempt nonprofit organization are currently among those exempt from the Registry and the Commission is justified in its decision to continue to allow these Exemptions.³

¹ 47 CFR § 64.1200(f)(3)(2002). "The term telephone solicitation means the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person, but such term does not include a call or message (i) To any person with that person's prior express invitation or permission, (ii) To any person with whom the caller has an established business relationship, or (iii) By or on behalf of a tax-exempt nonprofit organization."

² 68 Fed. Reg. 44144, 44147 (July 25, 2003).

³ 47 CFR § 64.1200(f)(3)(2002).

A. Justifications for maintaining exemptions for tax-exempt nonprofit organizations.

The Commission must remain firm to legal and societal justifications for the exemptions of Tax-exempt nonprofit entities from the Registry. The recent Federal District Court of Colorado decision in which Judge Nottingham ruled that the exemptions from the Registry based on call content were unconstitutional, cast doubt on the Commission's decision to allow political and charitable organizations to be exempt from the Registry. The Colorado Court held, "[t]he Federal Trade Commission has chosen to entangle itself too much in the consumers' decision by manipulating consumer choice and favoring speech by charitable (organizations) over commercial speech."⁴ While the Supreme Court has issued a stay and the Registry is currently operational, the outcome of the appeal could pose problems for the Registry-exempt status of tax-exempt nonprofit organizations.

The Commission does not need to eliminate the tax-exempt nonprofit organization exemptions in order for the Registry to comply with the First Amendment. While the easiest way to quash Judge Nottingham's First Amendment concerns would be to remove the content-based distinctions and allow charitable institutions to face the same fate as their commercial counterparts, this outcome would be extremely problematic for multiple reasons. Placing these calls in the same category with those calls made for a purely commercial purpose would defy the clear intent of Congress in enacting the TCPA.⁵ Furthermore, removing these exemptions would run contrary to the interests of society that would lose the benefits provided by the many charities that rely on donations raised through telemarketing efforts as their lifelines.

⁴ *Mainstream Marketing Services, Inc v. FTC*, 2003 U.S. Dist. LEXIS 17150 (Sept. 29, 2003)

⁵ 47 USC § 227 (a)(3)(1991) "The term 'telephone solicitation' means the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person, but such term does not include a call or message (A) to any person with that person's prior express invitation or permission, (B) to any person with whom the caller has an established business relationship, or (C) by a tax exempt nonprofit organization "

1. Legal justification for exemptions of tax-exempt nonprofit organizations from the Registry.

Exclusions of tax-exempt nonprofit organizations from the Registry should continue for three legal reasons: 1) Congress intended for these organizations to remain exempt from the Registry; 2) the exemption of these organizations does not prevent the Registry from promoting a legitimate government interest; and 3) solicitations made on behalf of these organizations lack the high-volume and unexpected nature of commercial solicitations. Tax-exempt nonprofit organizations were never intended to be subject to the TCPA so it follows that they were not meant to be subject to the any of the Rules implementing it, including the Registry. Therefore, these organizations should remain exempt.

In the Final Notice, The Commission provided, "We decline to extend the national do-not-call requirements to tax-exempt nonprofit organizations or entities that telemarket on behalf of nonprofit organizations."⁶ The Commission interpreted the exclusion of tax-exempt nonprofit organizations from the definition of "telephone solicitation" in the TCPA as intent by Congress to exclude these organizations from the Registry. The Federal Register Notice stated, "[The TCPA] specifically excluded calls made by tax-exempt nonprofit organizations or calls made by independent telemarketers on behalf of tax-exempt nonprofit organizations from the definition of telephone solicitation."⁷ The Commission further stated that it agreed with commenters who felt that exemptions for tax-exempt nonprofit organizations and independent telemarketers making calls on behalf of tax-exempt were justified.⁸ Therefore, in order to remain consistent with Congressional intent, the Commission must not allow those who are trying to remove the exemptions to succeed.

Furthermore, in addition to legislative consistency, a national Registry that restricts commercial solicitations and exempts those made by or on behalf of tax-exempt nonprofit organizations advances the government interest of protecting residential privacy. Thus, the Commission should continue to reject the arguments that because the Registry does not apply to tax-exempt nonprofit entities, the

⁶ 68 Fed. Reg. at 44148

⁷ *Id.*

⁸ *Id.*

Registry does not materially advance a government interest.⁹ Such an argument fails to distinguish between commercial and noncommercial speech and therefore is an invalid argument. The Federal Register Notice, quoting *Florida Bar*, states, "The Supreme Court has made it clear. . . 'The differences between commercial speech and noncommercial speech are manifest.'"¹⁰ Tax-exempt nonprofit entities such as charitable and political organizations do not proffer commercial speech. Therefore, the government can advance the substantial interest of protecting consumers from unwanted calls by restricting commercial solicitations and declining to restrict noncommercial ones. Thus, the exemptions for tax-exempt nonprofits can and should continue to be defended on this premise.

Moreover, the higher volume and unexpected nature of commercial solicitations compared to their noncommercial counterparts provides a further justification for the exemptions. "Congress found that the two sources of consumer problems - high volume of solicitations and unexpected solicitations - are not present in solicitations by nonprofit organizations."¹¹ This explanation parallels that which the Commission offered for the exempting of businesses with continued business relationships so it provides a rational basis for these exemptions.¹² However, recent comments to the FCC concerning this issue indicate that a large number of American consumers do not agree with the exemptions for charitable organizations. These commenters failed to see any distinction between a telephone solicitation made for a commercial purpose and one made for a tax-exempt nonprofit organization. However, despite this reaction by commenters, the legal arguments already presented in favor of the exemptions outweigh those against them. Therefore, since the exemptions for charitable organizations conform with Congressional intent of the TCPA, do not diminish the advancement of a material government interest and permit calls that are less burdensome than their commercial counterparts, these exemptions should remain intact.

⁹ *Id.* at 44152

¹⁰ *Id.* (quoting *Florida Bar v. Went For It*, 515 U.S. 618, 632 (1995))

¹¹ *Id.* at 44153 (quoting H.R. Rpt. 102-317, at § 16 (1991))

¹² Fed. Reg. at 44148

2. Societal justification for exemptions of tax-exempt nonprofit organizations from the Registry.

Since removing the exemptions of tax-exempt nonprofit entities would have a profound detrimental effect on charitable organizations and society in general, these exemptions must remain intact. Tax-exempt nonprofit organizations provide important societal benefits and the continuance of these functions could be in jeopardy if these organizations lose their Registry-exempt status. The IRS website explains what requirements are necessary in order for an organization to be tax-exempt under IRC 501(c)(3): the organization must have a noncommercial purpose, no earnings may directly benefit any shareholder or individual, and the company may not engage in attempts to influence legislation as a portion of its regular activities.¹³ The organizations described in IRC Section 501(c)(3) are commonly referred to as "charitable organizations."¹⁴ The IRS states:

"[T]he term charitable is used in its generally accepted legal sense and includes relief of the poor, the distressed, or the underprivileged; advancement of religion; advancement of education or science; erection or maintenance of public buildings, monuments, or works; lessening the burdens of government; lessening of neighborhood tensions; elimination of prejudice and discrimination; defense of human and civil rights secured by law; and combating community deterioration and juvenile delinquency."¹⁵

Clearly these organizations are serving meaningful societal interests, benefiting Americans both directly and indirectly by their continued existence.

Charitable organizations rely on funding received from individuals through telemarketing campaigns. The American

¹³ IRC § 501(c)(3)

¹⁴ Internal Revenue Service, *The Digital Daily, Charities & Non-Profits Exemptions Requirements* <<http://www.irs.gov/charities/article/0,,id=96099,00.html>> (Accessed October 14, 2003) (The purposes that 501(c) sets forth are not limited to "charitable" and also include "religious, educational, scientific, literary, testing for public safety, fostering national or international amateur sports competition, and the prevention of cruelty to children or animals.")

¹⁵ *Id*

Association of Fundraising Counsel Trust for Philanthropy reported that Americans gave \$212 billion dollars to charitable organizations in 2001. Of that amount, \$160.72 billion or 75.8% came from individuals.¹⁶ This means that for many of these organizations, proceeds that are obtained from individuals are vital to their continued existence. Since telemarketing is a common fundraising tool for these organizations, it logically follows that if charitable organizations were not exempt from the Registry, many charitable organizations would face decreased proceeds and some may even perish. Therefore, the decision to remove the Registry-exempt status from tax-exempt nonprofit organizations would be contrary to the both governmental and societal interests unless there were compelling reasons to do so. Fortunately, not only are there no compelling reasons to remove the exemptions, but the societal benefits provided by these organizations also offers convincing reasons to keep the exemptions. Therefore, the exemptions for tax-exempt nonprofit organizations should remain intact.

B. Organizations should be forced to meet certain standards before The Commission declares them exempt from the Registry.

"Relief of the poor" and "elimination of prejudice or discrimination" are lofty goals that are worthy of public support.¹⁷ However, under the current TCPA rules, companies that engage in telemarketing on behalf of government agencies are also exempt from the Registry. These exemptions for professional telemarketers who perform fundraising on behalf of tax-exempt nonprofit organizations present some serious potential problems such as 1) fraudulent or deceptive practices by professional telemarketing companies and 2) excessive charges for telemarketing services that result in the misallocation of funds collected.

The Federal Register notice of the final rule states, "[t]here has been no change in circumstances that warrants distinguishing calls made by a professional telemarketer on behalf of a tax-exempt nonprofit organization from those

¹⁶ American Association of Fundraising Counsel Trust for Philanthropy

< <http://www.aafrc.com/> > (accessed October 14, 2003).

¹⁷ IRC §501(c)(3)

made by the tax-exempt nonprofit itself."¹⁸ The Commission did not want to second-guess fund-raising efforts of charities as some organizations with limited resources may have no choice but to contract out the this function.¹⁹ While it is clear that the Commission included this provision in an attempt to ease these organizations' fund-raising efforts, the Commission may have overlooked potential problems with respect to commercial telemarketing companies that are engaging in telemarketing on behalf of charitable organizations. Therefore, this provision of the rule must be re-examined and the Commission should revise it to require that a tax-exempt nonprofit organization meet certain restrictions before it exempts the organization or any company performing telemarketing on an organization's behalf from the Registry.

1. The current regulations allow for tax-exempt nonprofit organizations and telemarketing companies performing fundraising on their behalf to engage in fraudulent telemarketing practices.

While tax-exempt organizations should remain exempt from the Registry, requiring an organization to meet certain restrictions before being declared exempt will counter any potential for fraudulent or deceptive practices by professional fundraisers. Some companies that conduct telemarketing on behalf of tax-exempt organizations have been participating in fraudulent activity in seeking contributions. The American Institute of Philanthropy ("AIP") website points to the recent Supreme Court decision of *Madigan v. Telemarketing Associates*. Here, VietNow National Headquarters, a charitable nonprofit corporation, contracted with Telemarketing Associates to have the telemarketer solicit donations to aid Vietnam veterans. Under the terms of the agreement, Telemarketing associates kept 85% of the gross receipts from Illinois donors and VietNow received the remaining 15%. Attorney General Lisa Madigan filed a complaint alleging *inter alia* that Telemarketing Associates was engaging in fraudulent and deceptive practices as it represented to donors that a "significant amount of each dollar donated would be paid over to VietNow for specifically identified charitable endeavors."²⁰ The Court held that Telemarketing Associates

¹⁸ 68 Fed. Reg. at 44160

¹⁹ *Id.*

²⁰ *Madigan v. Telemarketing Associates*, 538 U.S. ____ (2003).

was not engaging in deceptive telemarketing practices by failing to mention to donors that it was keeping 85% of the proceeds.²¹

The AIP points out that the Court essentially ruled that the fundraiser must knowingly provide false information with the intent to deceive in order to be held liable for fraudulent telemarketing practices. However, the difficulty and large expense of proving intent to deceive dissuades most regulators from enforcing fraud statutes and makes conviction for fraud in telemarketing practices nearly impossible.²² Therefore, if the exemption rules remain as is, they will provide free reign for telemarketers to engage in fraudulent telemarketing practices that are veiled in philanthropic ideals.

By allowing organizations such as VietNow to fall within an exemption to the Registry, and engage in fraudulent and deceptive behavior, the FTC and the FCC are implying that they condoning these activities. Further, one could argue that by enforcing the Registry and limiting the number of commercial calls, the Agencies made it even easier for these potentially fraudulent calls to be completed. If the regulations remain unfettered, situations similar to that of VietNow could become the norm rather than the exception. Therefore, an organization should be required to meet additional constraints prior to becoming exempt from the Registry in order to combat potential fraudulent telemarketing practices by professional organizations performing services on behalf of charities.

21 *Id.* (Telemarketing Associates kept more than \$6 million of the \$7.1 million raised between 1987 and the end of 1995. The case was remanded to the lower court not because Telemarketing Associates retained all this money but rather because the Court held that VietNow was engaging in fraudulent misrepresentations including claims that "90% or more of the donations were to go to the vets, donations would not be used for administrative expenses, and contributions would be used for Thanksgiving food baskets, monetary assistance in payment of bills and rent, and rehabilitation." In actuality, VietNow spent only \$118,000 or 4% of its \$3,173,000 2001 budget on program services.)

22 Daniel Borochoff, *American Institute of Philanthropy*

<<http://www.charitywatch.org/hottopics/VietNow.html>> (accessed October 14, 2003)

2. The current exemptions allow for telemarketing companies that perform fundraising on behalf of tax-exempt nonprofit organizations to engage in practices that result in under-allocations of revenues to the charitable organization itself.

In addition to potential for fraudulent practices, the current regulations also allow for charitable organizations to enter into agreements with professional telemarketers that result in the charity receiving little, if any, of the proceeds raised by telemarketer. The VietNow example is not unique in terms of the unconscionable amount of money being retained by the telemarketer performing services on behalf of charity. Based on 2001 reports from the Offices of State Attorneys General, a significant number of companies are conducting telemarketing on behalf of charitable organizations where very little, if any, of the money raised actually goes to the charitable purpose. Two such reports are *Pennies for Charities 2001*, from the Office of New York State Attorney General Eliot Spitzer and *Attorney General's Report on Telemarketing for Charity*, from the Office of Commonwealth of Massachusetts Attorney General Tom Reilly. These reports provide further evidence that organizations should be forced to meet standards of accountability before being declared exempt from the Registry.

a. *Pennies for Charity* (New York)

The *Pennies for Charity* report provides examples of professional telemarketers that are retaining the vast majority of funds raised.²³ The report, prepared by the Charities Bureau of New York State Attorney General's office, illustrates the amounts of contributions solicited by telemarketers that actually go to charitable programs. The data used was gathered from financial reports filed with the Charities Bureau. Both the professional fundraiser and the contracting charitable organization verified the reports, based on telemarketing fundraising campaigns in New York State. The report provides information about each telemarketing campaign, including the name of the charitable organization, the name of the professional organization raising donations on its behalf, amount of gross receipts, net to charity and percentage to

²³ N.Y. Atty. Gen., *Pennies for Charity* (Dec. 2001) (available at <http://www.oag.state.ny.us/charities/pennies01/penintro.html>).

charity. The chart below provides a summary of these organizations, broken down by percentage of funds retained by charities in 2000.²⁴

Percentage of Funds Retained by Charity²⁵

Percent to Charity	Number of Campaigns	Percent of Campaigns	Gross Amount Raised	Percent of Total Funds Raised	Net Amount Received	Percent of Total Net Amount
0(-100+)	2	0.30%	\$1,458,979.00	0.77%	\$1,345,051.48	2.27%
00-09%	6	1.00%	\$4,797,918.56	2.55%	\$4,005,409.22	6.75%
10-19%	15	2.60%	\$7,621,326.53	4.05%	\$5,608,800.13	9.45%
20-29%	25	4.30%	\$11,651,518.68	6.18%	\$7,480,505.52	12.61%
30-39%	58	9.90%	\$20,044,385.36	10.64%	\$10,732,672.80	18.09%
40-49%	46	7.90%	\$15,059,503.87	7.99%	\$6,755,909.98	11.39%
50-59%	114	19.40%	\$19,390,856.39	10.29%	\$6,361,686.14	10.72%
60-69%	164	28.00%	\$35,712,680.11	18.96%	\$8,183,390.60	13.79%
70-79%	94	16.00%	\$54,956,511.25	29.17%	\$8,218,824.00	13.85%
Below 0-9%	62	10.60%	\$17,699,886.80	9.40%	\$648,157.70	1.09%
TOTAL	586	100.00%	\$188,393,566.55	100.00%	\$59,340,407.57	100.00%

Charitable organizations retained 59.3 million or an average of 31.5% of the \$188.4 million in funds raised in New York and other states during 586 telemarketing campaigns of charities registered to solicit contributions in New York in 2000. The table also illustrates that some charities received a much smaller percentage, and others received nothing at all; ten percent of organizations received below zero to nine percent.²⁶

Further illustration that telemarketers are retaining an inordinate percentage of funds collected through telemarketing campaigns is provided by second graph included in the report. From 1994-2000, while the Total Gross receipts during telemarketing campaigns has increased significantly, the net percent retained by the charity has remained at a level very close to that of 1994.²⁷ The attorney General suggested possible legitimate explanations for these overwhelming costs: NY has a number of charities that are trying to recruit new donors, some of the charities are more focused on sending a message than collecting donations, or some organizations are engaged in

²⁴ Ia

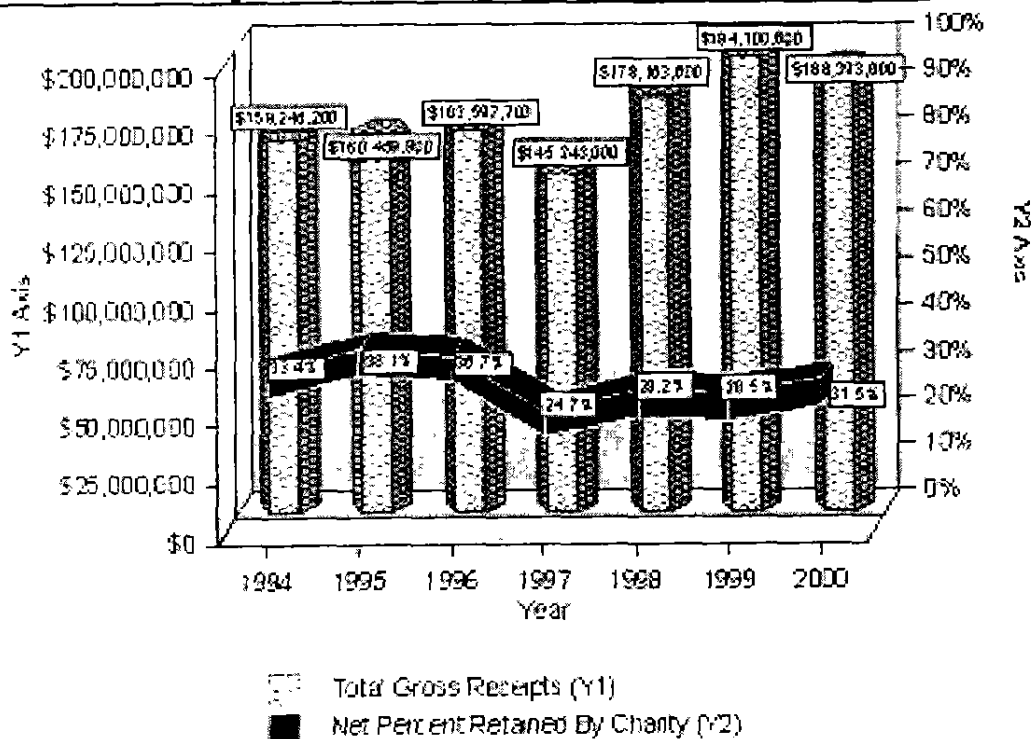
²⁵ Ia

²⁶ Id

²⁷ Id

other campaigns that offset the telemarketing losses.²⁸ While these explanations are possible, this discrepancy between money collected and that which actually going to a charitable purpose could also suggest that excessive costs associated with telemarketing on behalf of companies are not a new phenomenon at all and that New York, like many other states, has not yet dealt with this problem. Regardless of what the reason, certain telemarketing companies are soliciting charitable organizations in New York State and are retaining nearly all of the money raised on behalf of these charitable organizations. This result is inexcusable since the current Registry exemptions are facilitating these practices.

1994-2000 Comparison of Telemarketing Campaigns ²⁹



b. Attorney General's Report on Telemarketing for Charity (Massachusetts).

The Massachusetts report provides a further illustration that restrictions are necessary in order to prevent professional fund raisers from profiting at the expense of the American people and to the detriment of same

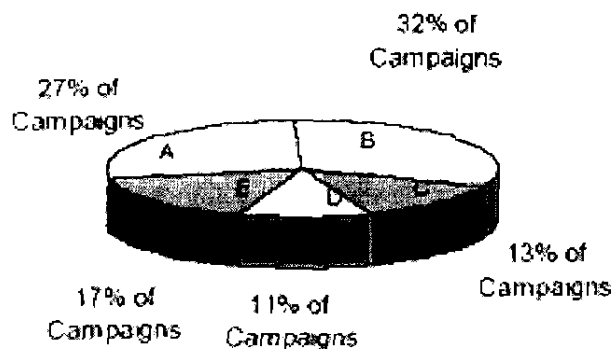
²⁸ Id

²⁹ Id

charitable organization that contracted for their services. The Massachusetts Attorney General's Report on Telemarketing for Charity begins with an explanation of charitable fundraising and the role of professional solicitors. The report consists of five parts: (A) Charities and Fundraising; (B) Fundraising Methods and Professional Fundraisers; (C) Tips for Informed Giving; (D) Sources of Information; and (E) Financial Results of 2001 Telemarketing Campaigns. The appendices to the report set forth the financial results of individual telemarketing campaigns conducted by professional solicitors.³⁰

Of the total dollars raised in all professional fundraising campaigns, 54% went to charity, after the expense of fundraising was deducted. Organizations received an average of 25% on a per campaign basis, meaning that on the average, charities received 25 cents for every dollar raised. Of charities that received money from fundraisers, the range was between a low of two cents to a high of one dollar for every dollar raised. In some instances, charities received no money from fundraisers campaigns, and other charities even incurred expenses that exceeded the funds they received at the end of the campaigns.³¹

**Telemarketing Campaigns by
Percentage of Revenue to Charity** ³²



Percentage of Gross Revenue to Charity	
A=50% or more	D=10% to 19%
B=30% to 49%	E=Less than 10%
C=20% to 29%	

³⁰ Mass. Atty. Gen., Attorney General's Report on Telemarketing for Charity (Nov. 2002) (available at < <http://www.ago.state.ma.us/charity/telrep01.pdf> >).

³¹ *Id.*

³² *Id.*

Like the New York report, the Massachusetts report indicates that there are a significant number of telemarketing companies soliciting charitable organizations and retaining nearly all of the money raised on behalf of these organizations. Congress in enacting the TCPA or the FCC in promulgating the rules regarding the Registry could not have intended for professional fund-raising organizations to enjoy large profits while the charitable organizations on whose behalf they engaged in telemarketing were left with little or no funds to effectuate their cause. Therefore, these reports provide one more reason why stricter standards should be imposed before an organization is declared exempt from the Registry.

D. The Council of Better Business Bureau Wise Giving Alliance Model Provides a Model that the Commission could follow before declaring an organization exempt.

Charitable organizations that are held to accountability standards would be forced to face a decision: either modify practices to comply with the standards and achieve exempt status or face the results of having a gravely diminished solicitation base. Therefore, the Commission must implement standards that hold a charitable organization accountable for its business decisions before declaring a tax-exempt nonprofit organization and the company performing fundraising on their behalf exempt from the Registry. While there are many standards that the Commission could follow, one suggestion is to implement standards such as those set forth by the Council of Better Business Bureaus Wise Giving Alliance. These guidelines, or similar ones, could serve as a basis for constructing requirements that must be met before an organization is declared exempt from the Registry.

1. Background on the BBB Wise Giving Alliance.

The BBB Wise Giving Alliance (the "Alliance"), an organization that gathers and disseminates information on hundreds of nonprofit organizations that solicit nationally or have national or international program services, provides basic Standards that the Commission could use in order to declare an organization exempt from the Registry. The Alliance developed Standards for Charity Accountability ("the Standards") in order to encourage informed decision

to foster public confidence in charitable donations.³³ The Standards were developed through a highly collaborative effort and included input from various individuals and organizations including "charitable organizations, the accounting profession, regulatory agencies, and the Better Business Bureau system."³⁴ Moreover, the Alliance also utilized independent research concerning donor expectations in order to ensure the standards reflected public sentiment.³⁵ Therefore, these standards seem to be highly comprehensive and would thus serve as a good model for the Commission for exemption purposes.

In order to comply with the Standards, organizations must show that they meet basic guidelines including: 1) Organization Governance 2) Spending 3) Truthfulness of Representations and 4) Willingness to disclose basic information to the public.³⁶ The Standards actually recommend ethical practices beyond mere disclosure in order to encourage the acts of giving and foster public confidence by promoting accountability. While some of these practices, such as promoting pluralism and diversity in the organization, do not have any real application to inclusion in the Registry, other Standards such as ensuring adherence to applicable local, state and federal laws and submitting financial information, and adopting an organizational commitment to accountability have direct significance and would aid the Commission in deciding whether to exempt certain nonprofit organizations.³⁷ Regardless of what factors the Commission decides are most appropriate, the Commission must implement basic requirements in order to hold Registry-exempt organizations accountable for deceptive fundraising practices and questionable business decisions.

2. Application of the standards to the Registry.

Specific examples that illustrate how the Standards are applied show how useful these requirements could be in determining whether to grant a charitable organization Registry-exempt status. VietNow and United Care USA are

³³ BBB Wise Giving Alliance <<http://www.give.org/>> (accessed October 14, 2003)

³⁴ *Id*

³⁵ *Id*

³⁶ BBB Wise Giving Alliance <<http://www.give.org/standards/index.asp>> (accessed October 14, 2003)

³⁷ *Id* A list of all the Standards can be found at the BBB website, www.give.org

organizations that do not meet the standards and therefore would not be exempt from the Registry if the Commission were to adopt accountability standards. Catholic Charities and the American Cancer society are examples of organizations that meet the standards and would therefore be declared exempt.

VietNow

The VietNow example discussed earlier is a perfect example to demonstrate the utility of imposing standards such as those set forth by the Alliance before declaring an organization exempt from the Registry. In accessing the report on VietNow, as provided on the BBB Alliance website, it is readily apparent that the organization does not meet the Standards. VietNow was lacking in several areas, including:

- Did not provide annual report or an independent audit report;
- VietNow spent \$100,676 or 3% of its total public contributions (\$3,610,574) on programs and activities described in its solicitations (according to the guidelines, at least 50% of public contributions should be applied to programs and activities);
- Fund raising costs were \$3,286,348 or 91% of related contributions (\$3,624,289) (according to Standards, should not exceed 50% or total income)³⁸

This example is probably the easiest demonstration of how beneficial it would be to require organizations to meet accountability standards before being declared exempt. Telemarketing Associates kept more than \$6 million of the \$7.1 million raised between 1987 and the end of 1995.³⁹ If the Registry had been in effect at this time, and VietNow had been evaluated based on these standards, it would never have been declared exempt from the Registry and the problems concerning the deceptive practices and misallocations of funds would have been eliminated before they started.

³⁸ BBB Wise Giving Alliance <<http://www.give.org>> (accessed October 14, 2003) (This report was no longer available on the Alliance website when tried to access it on November 25, 2003)

³⁹ *Madigan v. Telemarketing Associates*, 538 U.S. ____ (2003)

United Care USA

United Care USA is another illustration of the potential benefit of requiring charitable organizations to meet accountability standards. The charity does not meet nine of the Alliance Standards, including:

- Did not provide annual report or have an independent audit report completed
- Did not break down financial statements into program services, fund raising, and administrative categories
- Did not have board approved budget for its current fiscal year -indicates that UCUSA has not established adequate controls over disbursements
- Made unsubstantiated claims in solicitation materials - UCUSA's telemarketing script states, "We have over 6,000,000 documented cases of child abuse here in America..." and did not substantiate the source of this reference
- The telemarketing scripts did not identify the caller as an employee of an independent telemarketing firm hired by UCUSA to assist with fund raising efforts
- UCUSA's board of directors met only once in the fiscal year ended May 31, 2001
- UCUSA's paid president serves on the 4 member board of directors so 25% of the board of directors is directly compensated by the organization.⁴⁰

United Care would also not remain exempt from the Registry if it were required to meet accountability standards. Like many other charitable organizations, United Care's sole fund raising method is telemarketing so it would be very simple to eliminate or at the very least greatly impede the actions of such an organization by cutting off its calling base and requiring it to conform to the Registry. By examining basic guidelines such as these, the decision could be made whether to grant organizations such as VietNow or United Care exemptions to the Registry and potential problems could be eliminated before they begin as organizations that rely on telemarketing will be forced to either comply with the standards or perish.

⁴⁰ BBB Wise Giving Alliance, *Charity Reports, United Care USA*

< http://www.give.org/reports/care2_dyn.asp > (accessed October 14, 2003)

b. Examples of Organizations that meet the Standards.

Some positive examples are also useful to show the utility of requiring that nonprofit charities to meet accountability requirements in order to be eligible for Registry-exempt status. Two such examples of organizations that meet the Standards are Catholic Charities USA and the American Cancer Society. Portions of the Alliance reports for these organizations follow.

Catholic Charities USA

- Fund raising costs were 4% of donations received as a result of fund raising activities (which totaled \$35,450,839.)⁴¹

American Cancer Society, Inc.

- Fund raising costs were 19% of donations received as a result of fund raising activities (which totaled \$786,276,000)
- The society incurred joint costs of \$27,882,000 for informational materials and activities that included fund raising appeals. Of those costs, \$12,062,000 was allocated to program expenses and \$15,820,000 was allocated to fund raising expenses.⁴²

These examples illustrate that imposing requirements on charitable organizations would not be overly burdensome to the organizations that are raising funds through legitimate means and distributing them to genuine charitable purposes. Organizations such as Catholic Charities and the American Cancer Society would be unimpeded by requirements that they must meet basic standards in order to be declared exempt from the Registry.

Requiring a charitable organization to conform to simple standards before granting it Registry-exempt status will provide further justification for the Commission's decision to allow these organizations to remain exempt and will eliminate these fraudulent and unethical practices

⁴¹ BBB Wise Giving Alliance, *Charity Reports, Catholic Charities*

< http://www.give.org/reports/care_dyn.asp?109 > (accessed October 14, 2003)

⁴² BBB Wise Giving Alliance, *Charity Reports, American Cancer Society*

< http://www.give.org/reports/care_dyn.asp?26 > (accessed October 14, 2003)

before they begin. Most Americans would find it nearly impossible to understand why the situation described in the VietNow case, or several of the other New York or Massachusetts examples, in which a telemarketer keeps 85% or more of the proceeds that people are pledging to the charity is "less burdensome" than one in which a company engages in telemarketing for purely commercial purposes. That is why the Commission must find a way to hold these charitable organizations accountable for their decisions.

Consumers are making charitable donations to Registry-exempt organizations that are lining the pockets of telemarketing companies rather than accomplishing any charitable purpose. Administrative costs are a necessary part of any organization, nonprofit charities included. Some charities may be faced with high start-up costs or inefficiencies due to initial resistance to the charitable institution, or other time and capital-consuming issues. But in certain organizations, fundraising costs consume the bulk of the organization's proceeds because the same telemarketing companies that are currently banned from selling knives and carpet cleaners to people who have placed their name on the Registry are soliciting donations on behalf of charitable organizations and keeping an unconscionable percentage of the proceeds. Congress, the FTC or the FCC could never have intended this result.

V. Conclusion

Allowing tax-exempt nonprofit organizations to remain exempt from the Registry is appropriate both from a legal and ethical standpoint. However, the current exemption structure allows loopholes for organizations and those companies telemarketing their behalf to engage in fraudulent telemarketing practices and the misallocation of funds collected. Therefore, the Commission should institute more stringent guidelines that a "tax-exempt nonprofit organization" must meet in order to be declared exempt from the Registry. It seems clear that neither Congress, nor the FTC, nor the FCC intended to permit Registry-exempt organizations or those performing telemarketing on their behalf to engage in these kinds of fraudulent and unethical practices. Thankfully, the FTC and FCC have the ability to close this loophole and eliminate the bulk of the indiscretions by enacting stricter rules that will force organizations to either eliminate these practices or lose their exempt status.

This is a necessary step in order for Congress and the FCC, in cooperation with the FTC, to fulfill their obligations to American citizens as set forth in the TCPA and the Regulations implementing it.

Thank you once again for the opportunity to provide my thoughts regarding this issue.

Very truly yours,

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